COM/CXW/mnt * **ALTERNATE DRAFT** H-4a

Agenda ID # 1873
(Alternate Order to Agenda ID# 1868)
4/17/03
Ratesetting

Decision **ALTERNATE DRAFT DECISION OF COMMISSIONER WOOD**
(Mailed 03/4/03)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060.	Rulemaking 02-01-011 (Filed January 9, 2002)

OPINION DENYING ALBERTSON'S PETITION FOR MODIFICATION

I. Introduction

Albertson's, Inc. (Albertson's) filed a Petition to Modify Decision (D.) 02-03-055 (the "DA Suspension Implementation Decision") on October 11, 2002. Albertson's requests that the DA Suspension Implementation Decision be modified to allow direct access (DA) customers to add new locations or accounts to DA service provided there is no net increase in the amount of load served under DA as of September 21, 2001, the date that DA was suspended. This decision denies the Petition.

II. Position of Albertson's

Albertson's argues that D.02-03-055 should be modified to remove what it considers to be an unintended consequence. Under the DA Suspension Implementation Decision, customers are prohibited from adding new locations

or accounts to DA service after September 20, 2001,[1] regardless of whether they are permitted to do so under their DA contracts. DA customers are also prohibited from adding a new or additional account to DA service if doing so involves installation of additional meters or requires a new DASR to be submitted after September 20, 2001.[2] These rules were designed to prevent the addition of new DA load and the resulting shift of DWR costs to bundled service customers.[3]

Albertson's argues, however, that these rules go too far, in that they will cause DA customers to face a reduction in the amount of their load that is eligible for DA service every time they relocate or replace an existing facility. Albertson's claims that as a result, there will be an eventual "withering" of DA load, due to the closing or relocations of stores, factories or other facilities operated by DA customers. Albertson's contends that the result is not only harmful to DA customers, as well as the California economy, but also is contrary to the Commission's stated intent to allow DA to continue at pre-suspension levels. Unless the DA Suspension Implementation Decision is modified, Albertson's warns, the electric costs of Albertson's and similarly-situated customers will steadily increase as more of their load is forced to return to bundled service. In order to avoid that result, Albertson's seeks modification of the DA Suspension Implementation Decision to allow DA customers with multiple facilities to add new locations or accounts to DA service provided that there is no net increase in the amount of load served under DA.

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[1] D.02-03-055, *mimeo.*, p. 20 (Rule 5).

[2] *Id.* (Rule 6).

Albertson's claims this modification is consistent with Legislative intent underlying the suspension of the DA program mandated in Assembly Bill (AB) 1X. Albertson's argues that the Legislature did not terminate DA, but rather, suspended the right of customers to enter into new DA arrangements as of a date to be determined by the Commission. In the Suspension Decision, the Commission focused on not having the amount of DA load increase over time in order to avoid the risk of cost shifting. Albertson's argues that by maintaining then-current levels of direct access, its proposed modification does not violate that principle.

Specifically, in its initial pleading, Albertson's requested that the following three modifications be made to the rules set forth in the DA Suspension Implementation Decision:[4]

A. Modification of Rule 5

Albertson's requested that Rule 5 as set forth in D.02-03-055 be modified to read:

> **5. ~~No customer is allowed to~~ Customers may add a new location to direct access service after September 20, 2001, provided that there is no net increase in the customer load being served by direct access above that in effect as of September 20, 2001.**

Albertson's also proposes the following modification to the text relating to Rule 5:

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[3] *Id.*

[4] Proposed changes to the Implementation Decision are indicated through the use of strikeouts for deletions and underlining for additions.

> "Consistent with the principle of attaining a standstill of direct access service, adding new locations (and thus new load) to direct access service should be ~~prohibited~~ permitted only to the extent that the aggregate direct access load does not exceed that in effect as of September 20, 2001. As discussed above, ~~even if new locations are permitted under a direct access contract, a suspension as of September 20, 2001~~ it is reasonable and appropriate to prohibit increases in direct access load in order to balance important regulatory goals."

B. Modification of Rule 6

Rule 6 of D.02-03-055 be modified to read:

> **6. ~~No customer is allowed to~~ Customers may add a new or additional account to direct access service, provided there is no net increase in the amount of customer load being served by direct access as of September 20, 2001 ~~if that account involves installation of additional meters after September 20, 2001 or would require a new DASR to be submitted after September 20, 2001~~.**

Albertson's also proposed the following modification to the text relating to Rule 6:

> "Again, new or additional accounts or meters that cause an increase in the amount of direct access load as of September 21, 2001 would violate the standstill principle by adding new load, ~~and a prospective suspension is appropriate~~. In D.01-10-036, the Commission reaffirmed 'unless the Commission states otherwise in a subsequent decision' that utilities must process DASRs relating to pre-September 21,[5] 2001 direct access contracts or agreements.

[5] The original language in Rule 6 inadvertently referenced a pre-September 20, 2001 date, but should have referenced a pre-September 21, 2001 date, as corrected here.

> Rules 5 and 6 constitute such statement. However, new DASRs shall be processed by the utilities only if in accordance with the clarification of the standstill principle described above or if necessary to implement another provision herein (e.g., assignment, new customer name).
>
> "Rule should not be construed to prevent, after September 20, 2001, the installation of meters or meter-reading equipment as necessary to initiate direct access service for eligible customers, or the replacement or upgrade of existing meters for existing direct access customers. ~~But again: no customer shall be allowed to add any new account that is not on the October 5th or November 1st lists reference above.~~"

C. Modification of Discussion Section of Rule 1

Albertson's proposed that the final sentence of the discussion section of Rule 1 be modified to read:

> "We will allow additions to the October 5th and November 1st lists [footnote omitted] for customers with a valid direct access contract as of September 20, 2001 (~~but not for~~ including additional meters, accounts or sites as provided in Rules 5 and 6 below), using the AReM process, along with an affidavit signed by both the ESP and the customer stating under penalty of perjury that the contract date is correct."

III. Positions of Parties in Response to the Petition

Comments on Albertson's petition were filed by multiple parties on November 8, 2002. Various parties representing DA interests, including 7-Eleven, Inc., Strategic Energy, the University of California/California State University (UC/CSU), and the Alliance for Retail Energy Markets and the Western Power Trading Forum (AReM/WPTF), support the petition.

Strategic Energy asked for even additional modifications to remove the Rule 7 prohibition against large commercial and industrial customers to move between geographic locations within the utility service territory and still remain on DA. UC/CSU also support the Petition. but request modification of Rule 5 to reflect the language in Finding of Fact 12 which states: "It is reasonable to interpret a September 20, 2001 date for suspension of direct access to mean that the level of direct access load as of that date (irrespective of whether power had yet flowed under any direct access contract) should not be allowed to increase, *apart from normal load fluctuations*." (Emphasis added.)

Comments were also filed by the three investor-owned utilities: Pacific Gas & Electric Company (PG&E), Southern California Edison Company (SCE) and San Diego Gas & Electric Company (SDG&E).[6]

PG&E opposes the Petition. PG&E argues that the proposed revisions, if read literally, will swallow many of the rules or "criteria" articulated in D.02-03-055 and potentially result in a growth in DA load which would be impossible to manage or monitor. Nevertheless, PG&E does believe that a narrow but reasonable expansion of the current rules can be crafted to allow for normal business upgrades, remodeling, or relocations for specific DA accounts, from allowable levels as of the September 21, 2001 suspension date. PG&E believes these changes would be justified on fairness grounds but are not compelled by any Commission determination that DA load is a guarantee.

[6] SDG&E also requested, and was granted leave, to file a reply to parties' responses. SDG&E's reply was filed on November 19, 2002.

Toward this end, PG&E recommends that a Rule 22 Policy Working Group meeting be convened to develop such rule changes, including all details and protocols necessary to implement any subsequently approved modifications. PG&E proposes that the Working Group consider rule changes to permit a particular customer's facilities to be replaced and/or relocated and remain on DA service on a "one-for-one" or "account-by-account" basis to ensure consistency with the rationale of D.02-03-055. In other words, the intent would be to design rules to prevent any net increase in the amount of total DA load for each existing DA customer.

PG&E proposes that the workshop address at least the following issues: (1) scope of replacement or relocation permitted including geographic limitations, if any, (2) design of administrative procedures for requesting a DA replacement account, (3) development of a method for verifying that requirements are met (e.g., the development of a customer/ESP affidavit form) and, (4) coverage of potential interaction and harmonization with other DA suspension rules.

SCE also objects to the Petition, arguing that there is no practical way to easily determine and set an aggregate DA load in effect as of September 20, 2001 or that the utilities could assure that an aggregate cap is not exceeded on a day to day basis. Every day, new DA load is added to the system through both natural increases in load by existing DA customers and the addition of new DA accounts (within the limits of the suspension rules. SCE notes that California as a whole has experienced a DA load increase from 13.9 billion kWh in September 2001 to 22.4 billion kWh in August 2002.

Thus, SCE argues, the Commission cannot realistically cap the amount of eligible DA load at September 20, 2001 levels. Without a true cap and the ability

to monitor on a real time basis the addition and deletion of DA load, SCE argues, it is impractical to implement a rule that allows for the addition of DA accounts if "there is no net increase in the amount of customer load being served by direct access as of September 20, 2001."[7] SCE claims that there is no way to monitor DA activity across utility boundaries to ensure compliance with a cap, either on a state-wide, a utility-specific or customer-specific basis. As a result, SCE claims that the DA suspension rules would be rendered unenforceable, and the utilities would be placed in the position of having to accept all DASRs to add new accounts to DA service.

SDG&E agrees in principle with modification of D.02-03-055 to allow existing DA customers to do such things as upgrade their facilities due to a retrofit, relocate due to a lost lease, or relocate to a more energy efficient building, provided that there is no net increase in the customer's load. SDG&E is concerned, however, that Albertson's proposed language could be construed as a request that load could be aggregated on a widespread—even statewide—basis, provided that there is no net increase in total DA load. SDG&E argues that such a broad formulation conceivably could allow one DA customer's load to increase substantially provided that another's DA load decreases substantially. SDG&E does not consider such aggregation if DA load to comport with the Commission's "Standstill Principle."

SDG&E thus proposes alternative formulations of the rules and a process to permit existing DA customers to replace or relocate provided the changes occur on a per-account basis, rather than on an aggregated customer, ESP, utility-

[7] See Petition to Modify at p. 5 (Proposed Rule 6).

wide, or even statewide basis. SDG&E proposes that a particular customer be permitted to replace and/or relocate facilities only on a "one-for-one" or "account-by-account" basis to ensure consistency with the rationale of D.02-03-055. Thus, no net increase would be permitted in the amount of total DA load for each existing DA customer.

SDG&E also expresses concern that the utility not be put in the position of having to monitor whether there is a net increase in DA load, whether on a customer-specific basis or not. Thus, SDG&E proposes that both the DA customer and its ESP sign a form (yet to be designed) that would state, under penalty of perjury, that the DA customer's load will not increase by virtue of the relocation or replacement of facilities.

With these concerns in mind, SDG&E proposed the following Rule modifications to permit DA customers to replace or relocate their facilities on a customer-specific basis:

A. Rule 5 Revision:

> **A direct access ~~No~~ customer may ~~is allowed to~~ relocate to a new location or rebuild at that customers existing location provided that there is no net increase in that customer's load[8] being served by direct access above that in effect as of ~~to direct access service after~~ September 20, 2001.**

As modified, SDG&E believes this Rule permits seamless moves, as was permitted by Rule 7, and incorporates the no-new-load concept on a per-customer basis.

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[8] Customer or customer load as used by SDG&E denotes the specific DA account/meter, not the customer's aggregated load from all the customer's locations.

B. Rule 6 Revision:

Unless expressly authorized by Rule 5, above, n~~N o~~ customer is allowed to add a new or additional account to direct access service if that account involves installation of additional meters after September 20, 2001 or would require a new DASR to be submitted after September 20, 2001.

C. Rule 7 Deletion:

In view of its proposed revisions to Rule 5, SDG&E proposes to delete Rule 7 as redundant.

~~**7. Direct Access Residential and small commercial customers may move from one address to another within the UDC service area and continue to be served by the ESP serving them prior to the move.**~~

IV. Third-Round Replies

Albertson's was permitted to file a third-round reply in response to comments. Both replies were filed on November 19, 2002. SDG&E was also permitted to file a third-round reply on the same date.

Albertson's argues that the objections of PG&E and SCE can be accommodated by adopting the revisions suggested by SDG&E. In general, Albertson's agrees with the SDG&E changes to the rules, except as noted below.[9] SDG&E proposed changes to the suspension rules, but did not indicate any modifications to the explanatory language relating to each rule, as contained in the Implementation Decision. Albertson's continues to recommend that the

[9] Using SDG&E's proposed modifications as a starting point, Albertson's additional proposed changes are indicated through the use of strikeouts for deletions and underlining for additions.

explanatory language in the Implementation Decision relating to each of the modified rules also should be modified in order to be internally consistent.

Albertson's disagrees with SDG&E's proposal that customer load as used in the Implementation Decision should be read as denoting the specific DA account/meter, rather than the customer's aggregated load from all of the customer's locations within a utility's service territory. Albertson's claims that such a restriction is unnecessary and would be more complicated to implement.

Therefore, in its third-round reply, Albertson's proposed reformulations of SDG&E's modifications to replace the language proposed in Albertson's original petition, as set forth below:

(a) Rule 5 Proposed Modifications

5. A direct access customer may relocate to a new location <u>within its existing service territory</u> or rebuild at that customer's existing location provided that there is no net increase in that customer's load [footnote deleted] <u>within that existing service territory</u> being served by direct access <u>above in excess of</u> that in effect as of September 20, 2001.

Consistent with the principle of attaining a standstill of direct access service, adding new locations (and thus new load) to direct access service <u>should be</u> ~~prohibited~~ <u>permitted only to the extent that the customer- specific aggregate direct access load within the customer's existing service territory does not exceed that in effect as of September 20, 2001</u>. As discussed above, ~~even if new locations are permitted under a direct access contract, a suspension as of September 20, 2001~~ <u>it</u> is reasonable and appropriate to <u>prohibit increases in direct access load in order to</u> balance important regulatory goals.

(b) Rule 6 Proposed Modifications

6. Unless expressly authorized by Rule 5, above, no customer is allowed to add a new or additional account to direct

access service if that account involves installation of additional meters after September 20, 2001 or would require a new DASR to be submitted after September 20, 2001.

~~Again~~Except as provided in Rule 5 above, new or additional accounts or meters that cause an increase in the amount of direct access load as of September 20, 2001 would violate the standstill principle by adding new load~~, and a prospective suspension is appropriate~~. In D.01-10-036, the Commission reaffirmed, "unless the Commission states otherwise in a subsequent decision" that utilities must process DASRs relating to pre-September 21, 2001[10] direct access contracts or agreements. Rules 5 and 6 constitute such statement. However, new DASRs shall be processed by the utilities only if in accordance with the clarification of the standstill principle described above or if necessary to implement another provision herein (e.g., assignment, new customer name).

Rule 6 should not be construed to prevent, after September 20, 2001, the installation of meters or meter-reading equipment as necessary to initiate direct access service for eligible customers, or the replacement or upgrade of existing meters for existing direct access customers. ~~But again: no customer shall be allowed to add any new account that is not on the October 5th or November 1st lists reference above.~~

(c) Rule 7 Deletion

~~7. Direct Access Residential and small commercial customers may move from one address to another address to another within the UDC service area and continue to be served by the ESP serving them prior to the move.~~

[no explanatory wording required]

[10] See footnote on page 4.

Albertson's agrees with the SDG&E recommendation that Rule 7 be deleted, as it is now redundant of Revised Rule 5.

(d) Text Modification Relating to Rule 1

Finally, Albertson's continues to recommend that the final sentence of the discussion section of Rule 1 should be modified to read as follows:

> We will allow additions to the October 5th and November 1st lists [footnote omitted] for customers with a valid direct access contract as of September 20, 2001 (~~but not for~~ including additional meters, accounts or sites as provided in Rules 5 and 6 below), using the AReM process, along with an affidavit signed by both the ESP and the customer stating under penalty of perjury that the contract date is correct and/or that the amount of customer-specific aggregate direct access load within the customer's existing service territory that is related to the new meters, accounts or sites does not exceed that in effect as of September 20, 2001.

Albertson's additional wording as suggested above, is in accordance with the SDG&E recommendation that, "both the DA customer and its ESP sign a simple form (yet to be designed) that would state, under penalty of perjury, that the DA customer's load will not increase by virtue of the relocation or replacement of facilities."[11]

V. Discussion

While we understand the apparent concern raised by Albertson's, we are not persuaded that the rules set forth in D.02-03-055 require further clarification or modification. D.02-03-055 is clear in its intent to prohibit the addition of new locations or new accounts. This Commission's obligation is to fulfill its statutory

[11] SDG&E comments at p. 3.

responsibilities. The law does not direct this Commission to ensure that direct access load either increases or decreases. The Commission, however, is directed to ensure that customers ability to "acquire service form other providers shall be suspended until the department no longer supplies power…." This provision in AB 1X was needed to ensure the broadest base upon which to build the repayment structure required to meet the DWR obligations and to prevent further cost shifts. This Commission stated its intentions quite clear when it noted that the standstill concept adopted in D.02-03-055 "is consistent with our policy reasons for imposing direct access surcharges or exits (sic) fees, in lieu of an earlier suspension date, as an appropriate way to ***alleviate the significant cost-shifting*** of DWR costs on to bundled service customers."[12] (emphasis added)

The modifications sought by the Petitioner give us cause for concern that further diluting the effectiveness of the adopted rules would simply create loopholes and actually increasing the level of direct access load over time to the detriment of bundled ratepayers. D.02-03-055 established rules to ensure that direct access levels did not grow beyond those on September 20, 2001, under the guise of a "standstill policy." However, SCE properly notes that between September 2001 and August 2002, California as a state has seen an increase in direct access load of approximately 8,500 GWh (an increase of over **60%** above the direct access level on September 20, 2001).

Albertson's fails to explain how the rules established in D.02-03-055 lack the clarity it requires to prevent what it claims are "unintended" consequences.

[12] D.02-03-055, p.18

Rule 5 states that "…even if new locations are permitted under a direct access contract, a suspension as of September 20, 2001, is reasonable and appropriate to balance important regulatory goals." Rule 6 states that "again, new or additional accounts or meters would violate the standstill principle…." Rule 8 again states that "…no new locations or additional meters may be added. Assignments to a new customer is limited to the *same load at the same location*." (emphasis added) These rules are explicitly clear and unequivocal. No new accounts or locations are to be added.

We find some merit in SDG&E's proposed modifications to Albertson's Petition with respect to the ability of existing DA customers to rebuild on existing facilities. SCE points out that D.02-03-055 is ambiguous in its treatment of replacement facilities. In fact, D.02-03-055 is silent on this issue. However, we do will not adopt the changes proposed by SDG&E as it would revise the existing rules to expand the ability to move from one address to another from residential and small commercial DA customers to include large commercial and industrial customers. Parties' have argued that denying large commercial and industrial DA customers the ability to move from one address to another is unfair and without logic. However, we point out that parties had the opportunity to address this issue in the course of adopting D.02-03-055 and note that "no party object[ed] to this condition."[13] Parties have failed to offer compelling arguments why this modification should be granted at this time. Instead, we clarify here only that any existing DA customer may rebuild its facility at existing sites so long as the nature and scope of the business doesn't

[13] D.02-03-55, p22 slip opinion

change and there is no net increase of the customer's load at the existing location. This clarification requires no further changes or modifications to the rules set out in D.02-03-055.

Finally, it is worth noting that each of the three investor-owned utilities opposes Albertson's petition for some reason or other. SCE, PG&E, and SDG&E oppose the requested petition because it is overly broad. However, SDG&E supports the petition with some modifications. SCE further claims that Albertson's has failed to explain why the existing rules established in D.02-03-055 are so "…so flawed as to warrant a modification." The three utilities content that the modified rules, as proposed, would be difficult to control and monitor. We agree. Consistent with D.02-11-022, the Commission is currently in the process of determining whether, or to what extent, the cap should be revised after July 1, 2003, to ensure that the shortfalls in recovery of the DA CRS from DA customers, plus accrued interest charges, can be paid off over a reasonable period of time from future surplus collections. The requested modifications would simply create further uncertainty as to the actual future level of direct access as we attempt to determine the proper shortfall recovery mechanisms.

As such, we deny Albertson's Petition seeking to modify D.02-03-055. We deny all other requests for changes to D.02-03-055.

VI. Rehearing and Judicial Review

This decision construes, applies, implements, and interprets the provisions of AB 1X (Chapter 4 of the Statutes of the 2001-02 First Extraordinary Session). Therefore, Public Utilities Code Section 1731(c) (applications for rehearing are due within 10 days after the date issuance of the order or decision) and Public Utilities Code Section 1768 (procedures applicable to judicial review) are applicable.

VII. Comments on the Alternate Draft Decision

The Alternate Draft Decision of Commissioner Carl Wood was filed and served on parties on March 4, 2003. Comments on the Alternate Draft Decision were filed on March 24, 2003, and reply comments were filed on April 1, 2003. Based on review of parties' comments, we have made certain corrections, clarifications, and revisions, as set forth herein.

VIII. Assignment of Proceeding

Carl W. Wood and Geoffrey F. Brown are the Assigned Commissioners and Thomas R. Pulsifer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Customers are prohibited from adding new locations or accounts to DA service after September 20, 2001, under the DA Suspension Implementation Decision, regardless of whether they have such rights under their DA contracts.

2. DA customers are prohibited from adding a new or additional account to DA service if doing so involves installation of additional meters or requires a new DA Service Request (DASR) to be submitted after September 20, 2001.

3. Determining whether DA load was within existing limits exclusively on a facility-for-facility basis could be problematical if the new location's load was either slightly smaller or slightly larger than its predecessor.

4. D.02-03-055, Rule 5 is ambiguous in its treatment of replacement or rebuilding of existing DA customer's facility at existing location.

Conclusions of Law

1. In implementing AB 1X, the Commission's intent was to allow DA to continue at pre-suspension levels, thus ensuring the continued viability of the

DA market, while preventing growth in DA load that would result in costs being shifted to bundled service customers.

2. The Commission is directed by AB 1X to ensure that customers ability to "acquire service form other providers shall be suspended until the department no longer supplies power…."

3. The modifications sought by Albertson's would violate the DA suspension provisions of D.02-03-055 and AB 1X since new locations and accounts could be added.

4. D.02-03-055 does not prohibit existing DA customers should be permitted to rebuild facilities on existing locations (and thereby installing a new meter) and maintain DA status, provided there is no net increase in the customer's load at that location nor the nature and scope of the business doesn't change.

O R D E R

IT IS ORDERED that:

1. The Petition for Modification of Decision (D.) 02-03-055, as filed by Albertson's, Inc. is denied.

This order is effective today.

Dated _____, at San Francisco, California.

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached ***ORDER DENYING ALBERTSON'S PETITION FOR MODIFICATION*** of Commissioner Wood as on all parties of record in this proceeding or their attorneys of record.

Dated March 4, 2003, at San Francisco, California.

/s/ SUSIE TOY
Susie Toy

N O T I C E

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